A

NOOR AZMAN AZEMI v. ZAHIDA MOHAMED RAFIK

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP PCA
AZAHAR MOHAMED FCJ
ALIZATUL KHAIR OSMAN FCJ
B ROHANA YUSUF FCJ
MOHD ZAWAWI SALLEH FCJ
[CIVIL APPEAL NO: 02(f)-139-12-2017(W)]
30 JANUARY 2019
[2019] CLJ JT(2)

C

TORT: *Defamation – Libel – Defence – Absolute privilege – Police report – Maker of statements in police report regurgitated words in report to media reporters – Impugned words published in newspaper article – Consideration of public policy – Whether defence of absolute privilege available to maker – Whether police report* D *absolutely privileged – Whether absolute privilege extended to subsequent publication of contents of police report to public at large*

TORT: *Defamation – Libel – Defence – Justification – Maker of statements in police report regurgitated words in report to media reporters – Impugned words published in newspaper article – Whether defence of justification available to maker* E *– Whether burden of proof to establish defence of justification laid on claimant/maker*

The respondent ('the defendant') was an actress while the appellant ('the plaintiff') was her personal driver. The defendant had handed to the F plaintiff, RM200,000 in cash, and a cheque, to be banked in. Later, on the same day, the defendant tried to contact the plaintiff but to no avail. After contacting the bank, the defendant discovered that the plaintiff did not bank in the money as instructed. The defendant then took the initiative to look for the plaintiff at his house but he was nowhere to be found. Without hesitation, the defendant lodged a police report against the plaintiff. In her police report, G the defendant referred to the plaintiff by his name and alleged that he had run off with her money. After lodging the police report, the defendant was approached by reporters who were waiting for her outside the police station. The defendant repeated the contents of the police report to the reporters. Harian Metro later published an article entitled 'Zahida Rafik Terkedu' H ('the article'), which the plaintiff contended contained defamatory statements against him. The plaintiff commenced a defamation suit against the defendant on the grounds that the impugned words published in the article (i) referred to him and, in their natural and ordinary meaning, meant or were understood to mean that the plaintiff was, *inter alia*, dishonest, a thief and a criminal and I could not be trusted; (ii) were false, unfounded and maliciously published; and (iii) tainted his reputation and character and affected his opportunity to get a new job. The defendant raised the defence of absolute privilege and justification and counterclaimed for the return of RM200,000. The High

Court allowed the plaintiff's claim and dismissed the defendant's counterclaim. In rejecting the defendant's defence of absolute privilege, the High Court Judge found that she failed to give any reasonable excuse that necessitated the regurgitation of the police report and '… pandering to the press' was not an acceptable reasonable excuse. However, the Court of Appeal reversed the High Court's decision by allowing the defendant's counterclaim and dismissing the plaintiff's claim. Hence, the present appeal. The issues that arose for discussion and determination were (i) whether the defence of absolute privilege should be extended to the subsequent publication of the contents of a police report, by its maker, to the public at large; and (ii) whether there was a serious miscarriage of justice when the Court of Appeal misdirected itself in requiring the plaintiff to establish the defence of justification.

Held (dismissing appeal)
Per Azahar Mohamed FCJ delivering the judgment of the court:

(1) The law recognises that, on public policy consideration, on certain occasions, a person should be able to speak or write freely even though it was published with full knowledge of its falsity and even with the intention of injuring the plaintiff. When the defence of absolute privilege applies in certain situations, it offers complete protection and the defamation action would be struck out for disclosing no reasonable cause of action. If the occasion is absolutely privileged, it would then be a complete defence to a defamation action even if the statement was actuated by malice. (para 24)

(2) The police report was absolutely privileged and, therefore, was not actionable for the purpose of the law of defamation. The police report was the first step in the process of criminal investigation by the police. The police could not investigate a possible crime without the alleged criminal activity coming to their notice. With such a report, the crime would be investigated and the perpetrator would be brought to justice. The grounds of public policy, which explains the basis for the absolute privilege rule, is to encourage honest and well-meaning persons to assist in the process of investigating a crime, with a view to prosecution, by relieving the persons who lodged the police report from fear of being sued for something they say in the reports. (para 37)

(3) The defendant, when approached by the reporters, after she had lodged the police report against the plaintiff, repeated what was stated in the police report to the reporters. There is no public policy consideration to recognise that once the police report is absolutely privileged, it remains so at whatever occasion it is subsequently published. Absolute privilege would not attach to the subsequent publication of the contents

of the police report to the public at large save where the contents were made in or in connection to judicial or *quasi*-judicial proceedings. Furthermore, the necessity for the defendant to publish the contents of the police report, to the public at large, was not demonstrated. (paras 38, 49 & 50)

(4) The plaintiff argued that the Court of Appeal misdirected itself in requiring the plaintiff to establish the defence of justification. The complaint of the plaintiff was due to a mistaken reading of the judgment of the Court of Appeal. The plaintiff misapprehended the terms of the judgment of the Court of Appeal in making the submissions. What the Court of Appeal meant was that the plaintiff instituted the defamation action and it was trite law that the plaintiff bore the burden of proof that the impugned statements were, in fact, defamatory in nature. It was wrong to suggest that the Court of Appeal required the plaintiff to establish the defence of justification. The burden laid on the defendant to establish the defence of justification. It had not been shown that a serious miscarriage of justice had occurred. (paras 56, 58, 59 & 62)

Bahasa Malaysia *Headnotes*

Responden ('defendan') seorang pelakon manakala perayu ('plaintif') bekerja sebagai pemandu peribadinya. Defendan telah menyerahkan kepada plaintif, wang tunai berjumlah RM200,000, dan sekeping cek, untuk dimasukkan ke dalam bank. Defendan kemudian cuba menghubungi plaintif, pada hari yang sama, namun gagal. Selepas menghubungi bank, defendan mendapat tahu plaintif tidak memasukkan wang tersebut ke dalam bank, seperti yang diarahkan. Defendan seterusnya mengambil inisiatif mencari plaintif di rumahnya tetapi dia tidak dijumpai. Tanpa berlengah, defendan terus membuat laporan polis terhadap plaintif. Dalam laporan polisnya, defendan merujuk plaintif dengan namanya dan mendakwa plaintif melarikan diri membawa wang defendan. Selesai membuat laporan polis, defendan didatangi wartawan-wartawan yang menunggunya di luar balai polis. Defendan mengulangi kandungan laporan polis tersebut kepada para wartawan. Harian Metro telah menerbitkan satu artikel bertajuk 'Zahida Rafik Terkedu' ('artikel tersebut'), yang plaintif dakwa mengandungi pernyataan-pernyataan yang memfitnahnya. Plaintif memulakan satu guaman berasaskan fitnah terhadap defendan atas alasan perkataan-perkataan yang dipersoalkan, yang diterbitkan dalam artikel tersebut (i) merujuk padanya dan, dalam maksud semula jadi dan biasanya, bermaksud atau difahami agar bermaksud plaintif, antara lain, tidak jujur, seorang pencuri dan penjenayah dan tidak boleh dipercayai; (ii) palsu, tidak berasas dan diterbitkan dengan niat jahat; dan (iii) mencemar reputasi dan wataknya dan menjejaskan peluangnya mencari kerja baharu. Defendan membangkitkan pembelaan perlindungan mutlak dan justifikasi dan menuntut balas pemulangan RM200,000. Mahkamah Tinggi membenarkan tuntutan plaintif dan menolak tuntutan balas defendan. Menolak pembelaan perlindungan mutlak yang

dibangkitkan oleh defendan, Hakim Mahkamah Tinggi mendapati defendan gagal memberi apa-apa alasan munasabah yang memerlukan curahan semula laporan polis dan '… memenuhi kehendak akhbar' bukan alasan munasabah yang boleh diterima. Walau bagaimanapun, Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi dengan membenarkan tuntutan balas defendan dan menolak tuntutan plaintif. Maka timbul rayuan ini. Isu-isu berbangkit untuk dibincangkan dan diputuskan adalah (i) sama ada pembelaan perlindungan mutlak harus merangkumi penerbitan terkemudian kandungan laporan polis, oleh pembuatnya, kepada masyarakat umum; dan (ii) sama ada terdapat kekhilafan serius apabila Mahkamah Rayuan tersalah arah dalam mengkehendaki agar plaintif membuktikan pembelaan justifikasi.

Diputuskan (menolak rayuan)
Oleh Azahar Mohamed HMP menyampaikan penghakiman mahkamah:

(1) Mahkamah mengiktiraf bahawa, atas pertimbangan polisi awam, dalam beberapa keadaan, seseorang boleh bebas bersuara atau menulis walaupun ini diterbitkan dengan pengetahuan penuh kepalsuannya dan walaupun dengan niat menjejaskan plaintif. Apabila pembelaan perlindungan mutlak terpakai dalam beberapa keadaan, ini memberi perlindungan penuh dan tindakan berasaskan fitnah akan dibatalkan kerana tidak mendedahkan kausa tindakan munasabah. Jika keadaan ini dilindungi secara mutlak, ini menjadi pembelaan penuh untuk tindakan berasaskan fitnah sekali pun jika pernyataan tersebut didorong oleh niat jahat.

(2) Laporan polis tersebut dilindungi secara mutlak dan, berikutan itu, tidak boleh diambil tindakan untuk tujuan undang-undang fitnah. Laporan polis ialah langkah pertama dalam proses siasatan pihak polis. Pihak polis tidak boleh menyiasat kemungkinan jenayah tanpa diberi notis dakwaan aktiviti jenayah. Melalui laporan sedemikian, jenayah akan disiasat dan pelakunya akan dihadapkan ke muka pengadilan. Alasan polisi awam, yang menjelaskan asas peraturan perlindungan mutlak, bertujuan menggalakkan orang-orang yang jujur dan berniat baik untuk membantu dalam proses siasatan jenayah dengan objektif pendakwaan demi membebaskan orang-orang yang membuat laporan polis daripada ketakutan disaman atau apa-apa yang mereka katakan dalam laporan tersebut.

(3) Defendan, apabila didekati oleh wartawan-wartawan selepas membuat laporan polis terhadap plaintif, mengulangi apa-apa yang dinyatakan dalam laporan polisnya kepada para wartawan. Tiada pertimbangan polisi awam yang mengiktiraf bahawa, apabila laporan polis dilindungi secara mutlak, perlindungan ini kekal dalam apa-apa keadaan jika laporan ini kemudian diterbitkan. Tiada perlindungan mutlak terhadap penerbitan terkemudian kandungan laporan polis tersebut untuk

masyarakat umum kecuali jika kandungan tersebut dibuat atau berkaitan prosiding kehakiman atau separa kehakiman. Tambahan lagi, keperluan defendan menerbitkan kandungan laporan polis tersebut, kepada masyarakat umum, tidak ditunjukkan.

(4) Plaintif menghujahkan Mahkamah Rayuan tersalah arah apabila mengkehendaki agar plaintif membuktikan pembelaan justifikasi. Aduan plaintif adalah akibat salah bacaan penghakiman Mahkamah Rayuan. Plaintif tersilap faham terma-terma penghakiman Mahkamah Rayuan dalam merangka hujahannya. Mahkamah Rayuan sebenarnya memaksudkan bahawa plaintif memulakan tindakan berasaskan fitnah dan undang-undang matan menetapkan plaintif memikul beban pembuktian bahawa pernyataan-pernyataan yang dipersoalkan, hakikatnya, bersifat memfitnah. Salah untuk mencadangkan Mahkamah Rayuan mengkehendaki plaintif membuktikan pembelaan justifikasi. Beban dipikul oleh defendan untuk membuktikan pembelaan justifikasi. Tidak ditunjukkan satu kesilapan serius oleh mahkamah telah berlaku.

Case(s) referred to:

Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd Kassim [2009] 2 CLJ 121 CA ***(refd)***

Clarence Wilfred v. Tengku Adnan Tengku Mahmud & Anor [1983] 1 CLJ 136; [1983] CLJ (Rep) 518 HC ***(refd)***

Darker v. Chief Constable of the West Midlands Police [2000] 4 All ER 193 ***(foll)***

Dato' Dr Low Bin Tick v. Datuk Chong Tho Chin & Other Appeals [2017] 8 CLJ 369 FC ***(refd)***

Datuk Harris Mohd Salleh v. Datuk Yong Teck Lee & Anor [2018] 1 CLJ 145 FC ***(refd)***

Farrell v. St John's Publishing Co Ltd [1986] NJ No. 19 ***(refd)***

International Times & Ors v. Leong Ho Yuen [1980] 1 LNS 31 FC ***(refd)***

Kalung Makmur Sdn Bhd v. Lo Yen Nyuk [2018] 1 CLJ 459 CA ***(refd)***

Lee Yoke Yam v. Chin Keat Seng [2012] 9 CLJ 833 FC ***(dist)***

Mann v. O'Neill [1997] 191 CLR 204 ***(refd)***

Reynolds v. Times Newspapers Ltd [2001] 2 AC 127 ***(refd)***

S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***

Sharifuddin Mohamed & Anor v. Dato' Annas Khatib Jaafar & Another Appeal [2016] 3 CLJ 574 CA ***(refd)***

Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee [2015] 8 CLJ 477 FC ***(refd)***

Tan Sri Dato' Seri Musa Dato' Hj Hassan v. Dato' Seri Anwar Ibrahim [2010] 8 CLJ 239 HC ***(refd)***

Taylor v. Serious Fraud Office [1998] 4 All ER 801 ***(refd)***

Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor And Other Applications [2011] 1 CLJ 51 FC ***(refd)***

Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***

YB Menteri Sumber Manusia v. Association Of Bank Officers, Peninsular Malaysia [1999] 2 CLJ 471 FC ***(refd)***

Westcott v. Westcott [2008] EWCA Civ 818 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 96(a)
Criminal Procedure Code, s. 107
Federal Constitution, art. 10

Other source(s) referred to:
Doris Chia's Defamation, Principles and Procedure in Singapore and Malaysia, 2016 edn, paras. 9.6 & 11.43
Evan on Defamation, 3rd edn, pp. 142-143
Gately on Libel and Slander, 12th edn, paras. 1.1, 13.1

For the appellant - Gopal Sri Ram, Latheefa Koya, Shahid Adli Kamarudin, Damien Chan & Khairul Anwar; M/s Daim & Gamany
For the respondent - Muhammad Shafee Abdullah & Wan Aizuddin Wan Mohammed; M/s Shafee & Co

[Editor's note: For the Court of Appeal judgment, please see Zahida Mohamed Rafik v. Noor Azman Azemi [2017] 10 CLJ 717 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Azahar Mohamed FCJ:

Introduction

[1] This appeal arises from the decision of the Court of Appeal dated 16 May 2017, which reversed the decision of the High Court. The appellant was the plaintiff, while the respondent was the defendant before the High Court.

[2] The appellant's action in the High Court was one of damages for defamation. We are concerned in this appeal with whether the subsequent publication of a police report (an absolute privileged document) to the world at large, would enjoy the same protection of absolute privilege, and for that reason not actionable for the purpose of the law of defamation.

[3] On 26 February 2015, the High Court allowed the appellant's claim and awarded general damages in the sum of RM150,000 with costs of RM40,000. The High Court dismissed the counterclaim of the respondent.

[4] However, on appeal by the respondent, the Court of Appeal reversed the judgment and set aside all the orders of the High Court and thus allowing the respondent's counterclaim of RM200,000 with costs of RM50,000.

[5] We will be referring to parties in this judgment as they were in the High Court. This is the plaintiff's appeal.

The Facts

[6] The defendant is an actress. The plaintiff was her personal driver.

[7] On 29 February 2012, the plaintiff went to work as usual at the defendant's house. The plaintiff was then asked by the defendant to count monies that she had just received. The defendant then handed to the plaintiff RM200,000 in cash and a cheque in the amount of RM120,000 to be banked in.

[8] Sometime later on the same day, the defendant tried to contact the plaintiff but was unsuccessful. At about 3.45pm, the defendant contacted Maybank Jalan Ampang Branch to enquire whether the monies she had handed over to the plaintiff had been banked in as instructed. The bank officer informed the defendant that there was no transaction made in respect to her bank account that day.

[9] The defendant, together with her sister and brother-in-law, went to the plaintiff's house to look for the plaintiff and was told by the plaintiff's mother that he was not at home.

[10] At about 6.30pm the same day, the defendant lodged a police report against the plaintiff at the Ampang Jaya police station. She stated the following in the police report:

> PADA 29/02/2012 JAM L/KURANG 1130HRS SAYA SEPERTI NAMA DAN ALAMAT DI ATAS NOORAZMAN BIN AZMI NO KP (7401214-14-6237) NO TEL. (0193731974) PEMANDU PERIBADI SAYA TELAH MELARIKAN WANG TUNAI SEBANYAK RM200,000.00. SAYA TELAH MENYERAHKAN WANG TERSEBUT KEPADANYA UNTUK BANK IN DALAM AKAUN SAYA.

[11] In essence, the defendant alleged in the report that the plaintiff had run off with the defendant's money amounting to RM200,000. The plaintiff was referred to by his name in the police report. Clearly, the literal and ordinary meaning of the contents of the police report meant that the plaintiff is a criminal and untrustworthy. The words in the police report were plainly capable of being defamatory of the plaintiff.

[12] More important still, the following facts are irrefutable. After making the police report, the defendant was then approached by the reporters who were waiting for her outside the police station. The reporters had enquired the reason she went to the police station. The defendant informed them that she had lodged a police report against the plaintiff. She also repeated the contents of the report to the reporters. As we shall explain later, this is an important point that should be kept in mind.

[13] On 3 March 2012, Harian Metro published an article entitled "Zahidah Rafik Terkedu" (Zahida Rafik speechless), the subject matter of the defamation suit, which the plaintiff contended, contains defamatory statements against him ("the impugned words").

[14] On 27 November 2013, the plaintiff commenced legal proceedings against the defendant for defamation in relation to the impugned words uttered by the defendant to the reporters, which was subsequently published in Harian Metro. The article "Zahidah Rafik Terkedu", with the impugned words appearing in bold, reads as follows:

> **AMPANG: Pelakon Zahida Mohamed Rafik, 37, kerugian RM200,000 dilarikan pemandu peribadinya selepas diarah memasukkan wang berkenaan ke dalam akaun banknya.**
>
> Zahida yang popular menerusi fliem komedi Anak Mami The Movie menyerahkan wang tunai berkenaan kepada **lelaki berusia 37 tahun itu pada kira-kira jam 11 pagi Rabu dan sejak itu suspek gagal dihubungi serta dipercayai sudah melarikan diri.**
>
> Pelakon kacukan Melayu-Pakistan itu yang menjalankan perniagaan milik keluarganya di sini turut ke rumah suspek untuk mencarinya, tetapi tidak berhasil apabila dimaklumkan lelaki berkenaan tidak pulang ke rumah dan gagal dihubungi. Zahida kemudian membuat laporan di Ibu Pejabat Polis Daerah (IPD) Ampang Jaya, di sini, pada petang hari sama.
>
> Ketua Polis Daerah Ampang Jaya, Asisten Komisioner Amiruddin Jamaluddin mengesahkan **menerima laporan berkenaan dan kes itu disiasat mengikut Seksyen 406 Kanun Keseksaan kerana pecah amanah**.
>
> **Sementara itu, Zahida ketika dihubungi semalam berkata, apa yang berlaku mungkin kesilapannya sendiri kerana terlalu percaya terhadap pemandunya itu.**
>
> **"Saya percayakannya sebab dia sudah bekerja dengan saya hampir lima tahun dan sebelum ini tidak pernah melakukan apa-apa kesalahan," katanya.**
>
> **Zahida berkata wang RM200,000 itu sepatutnya digunakan untuk membuat pembayaran kepada rakan perniagaannya di China.**
>
> Sebelum ini sudah banyak kali dia (suspek) membantu saya dalam urusan memasukkan duit ke dalam akaun bagi urusan kerja, tapi tidaklah jumlah yang besar sebegini. "Kebiasaannya saya akan turut sama pergi dan dia hanya menemani. Namun, kali ini saya benar-benar tidak sempat kerana ibu sakit dan saya agak kelam-kabut di rumah bagi menguruskan beberapa perkara," katanya. **Menurut Zahida, dia langsung tidak menjangka pemandunya sanggup menghilangkan diri bersama wang RM200,000 itu.**
>
> "Sebelum membuat laporan polis, saya ke rumahnya. Maklumlah sudah hampir lima tahun dia bekerja dengan saya, saya kenal anak-anak dan ibunya yang tinggal bersama. Mungkin juga dia ada masalah kewangan atau memerlukan duit, jadi saya ke rumahnya untuk bertanya dan berbincang. Namun ibunya hanya memberitahu dia sudah beberapa hari tidak pulang ke rumah. Jadi, saya tiada pilihan selain melaporkannya kepada polis," katanya.

[15] The English translation of the article, as pleaded in the statement of claim, is as follows:

> **AMPANG: The actress Zahida Rafik, 37, lost RM200,000 which were stolen by her driver after he was instructed to deposit the money into her bank account.**
>
> Zahida, which is popular through the comedy film Anak Mami The Movie, handed the money to **the 37 years old guy at around 11 am last Wednesday and after that the suspect could not be contacted and is believed to have fled**.
>
> The mix Malay-Pakistani actress which ran the family owned business here also went to the suspect's house to search for the suspect, but was unsuccessful when she was told that the man did not came home and could not be contacted.
>
> Zahida then made a report at the district police headquarters (IPD) Ampang Jaya, here, in the afternoon on the same day.
>
> Ampang Jaya district police chief, Assistant Commissioner Amiruddin Jamaluddin confirmed **receiving the report and that the case is being investigated under Section 406 of the Penal Code for breach of trust.**
>
> **Meanwhile, Zahida when contacted yesterday, said what happened might be her own fault for being too trusting of the driver.**
>
> **"I trusted him because he had worked for me for almost five years and before this had never done anything wrong," she said.**
>
> Zahida said the RM200,000 was supposed to be used to make payment to her business partner in China.
>
> "Before this there were already several times he (the suspect) helped me in the matter of depositing money into the account for work purposes, but not a huge amount such as this".
>
> "Normally I would also go and he would just accompany me. However, this time I did not have the time because my mother was sick and it was quite chaotic at home as I was managing a number of things," she said. **According to Zahida, she did not expect at all that the driver would disappear with the RM200,000.**
>
> "Before making the police report, I went to his house. As it has been nearly five years that he worked with me, I knew the kids and his mother who live with him." "Maybe he has financial problems or in need of money, so I went to his house to ask questions and discuss. But his mother said he had not come home for a few days. So, I have no choice but to report it to the police," she said.

[16] The plaintiff contended that the impugned words were meant to refer to him, and that in their natural and ordinary meaning meant or were understood to mean that the plaintiff "is someone who is not honest; is a thief; is someone who cannot be trusted; is a criminal; is someone who is dishonest, is someone who does not have a good reputation; is someone who

has no moral." The plaintiff further contended that the impugned words are false, unfounded and maliciously published. The impugned words had tainted his reputation, character as well as affected his opportunity to get a new job.

[17] The defendant raised the defence of justification and absolute privilege. It is the defendant's pleaded case that she had received cash of RM243,000 on 28 February 2012 from one Shaheful Ardan Adenan (DW4) as commission due to her in respect of a business transaction between them. The defendant also pleaded that the impugned words enjoyed ancillary privilege as it was a regurgitation of the police report which is protected by absolute privilege. The defendant also counterclaimed for the return of RM200,000.

Decision Of The High Court

[18] As stated earlier, the High Court allowed the plaintiff's claim against the defendant and dismissed the defendant's counterclaim. The High Court held:

(i) The impugned words are clearly defamatory;

(ii) The fact that the impugned words refer to the plaintiff is not in issue. The defendant does not dispute the impugned words refer to the plaintiff who was, at the material time, her personal driver;

(iii) The plaintiff had proved on the balance of probabilities, his claim of defamation against the defendant;

(iv) The impugned words are not covered by absolute privilege; and

(v) The defendant has failed to prove the defence of justification.

[19] In rejecting the defence of absolute privilege in an ancillary manner, the learned High Court Judge had relied on her grounds of judgment in the striking out application that was before her. The learned judge concluded that the defendant "as an actress of no small fame" knew that the reporters would publish her statements and there was therefore implied consent to publish the answers to the questions posed by the reporters. The learned judge found that the defendant failed to give any reasonable excuse that necessitated the regurgitation of the police report and that "... pandering to the press." is not an acceptable reasonable excuse.

Decision Of The Court Of Appeal

[20] The defendant appealed to the Court of Appeal. The order of the High Court on damages was set aside and the defendant's counterclaim was allowed. In doing so, the Court of Appeal held:

(i) The evidence adduced plainly shows that the impugned words in the article were in fact nothing more than a regurgitation of the words in the police report. The police report was republished in the impugned

A article. The High Court erred when it concluded that the defence of absolute privilege is not available to the defendant. The publication of the alleged defamatory contents of the publication in the Harian Metro attracts the same privilege in an ancillary manner as that attaching to the police report. Therefore the publication of the impugned article in
B Harian Metro would enjoy the protection of absolute privilege in an ancillary manner;

(ii) During cross-examination, the plaintiff himself readily admitted that the defendant definitely had more money than RM243,000. No evidence was adduced by the plaintiff to prove that the intention of the defendant
C filing the police report and making the accusations against him was because he knew of her alleged affair with a Minister. The High Court also failed to consider the veracity and credibility of the plaintiff as a witness, especially his conduct after he failed to return to work and his disappearance immediately after the alleged incident; and

D (iii) The counterclaim is allowed as the defendant has established on the balance of probabilities the truth of the statement in her police report that the plaintiff had run off the sum of RM243,000 that she entrusted him to bank into her account.

E **The Question Of Law On Appeal To The Federal Court**

[21] The plaintiff then filed a motion to seek leave to appeal to the Federal Court under s. 96(a) of the Courts of Judicature Act 1964. On 30 November 2017, this court granted the plaintiff leave to appeal on the following question of law pertaining to the defence of absolute privilege for the purpose
F of the law of defamation:

> Whether the publication of the contents of a police report by its maker to the public at large is protected by absolute privilege having regard to the decisions in *Lee Yoke Yam v. Chin Keat Seng* [2012] 9 CLJ 833; [2013] 1 MLJ 145, *Taylor v. Serious Fraud Office* [1998] 4 All ER 801 and
G *Darker v. Chief Constable of the West Midlands Police* [2000] 4 All ER 193?

[22] Hence, the present appeal of the plaintiff before this court.

[23] An important point to note is that the present appeal is solely focused on the defendant's defence of absolute privilege as encapsulated in the
H question of law.

[24] In considering this appeal, at the outset, it is necessary to bear in mind that the law recognises that on public policy consideration, on certain occasions a person should be able to speak or write freely and should be free from accountability by way defamation suit even though it was published
I with full knowledge of its falsity and even with the intention of injuring the plaintiff. When the defence of absolute privilege applies in certain situations, it offers complete protection and the defamation action will be struck out for

disclosing no reasonable cause of action. If the occasion is absolutely privileged, then it will be complete defence to a defamation action even if the statement was actuated by malice. This well-established principle is summarised in *Gately on Libel and Slander* (12th edn) at para. 13.1 as follows:

> The law recognises that there are certain situations ("privileged occasions") in which it is for the public benefit that a person should be able to speak or write freely and that this should override or qualify the protection normally given to reputation by the law of defamation. In most cases the protection of privilege is qualified, i.e. the defence is displaced by "malice", but there are certain occasions on which public policy and convenience require that a person should be wholly free from even the risk of responsibility for the publication of defamatory words and no action will therefore lie even though the defendant published the words with full knowledge of their falsity and even with the express intention of injuring the claimant. A statement of case, which alleges publication on any such occasion of "absolute privilege" will be struck out as disclosing no legally recognisable claim (or as it would formerly have been said, disclosing no cause of action).

[25] At the hearing before us, the contending views of learned counsel for the plaintiff can be summarised as follows. The defence of absolute privilege is in principle inconsistent with the rule of law. Absolute privilege has been extended to protect a statement contained in a police report lodged under s. 107 of Criminal Procedure Code based on public policy consideration. The protection should not be given any wider meaning than is absolutely necessary in the interests of the administration of justice. There is no reason why the maker of a police report should be free from accountability by way of defamation to publish the contents of the report to the world at large. Any public policy and interests of justice do not envisage this. This is the essence of his contention. The general rule is that the extension of absolute privilege is viewed with the most jealous suspicion and resisted unless its necessity is demonstrated. Absolute privilege should only be extended to statements that are akin to a police report and not to the republication of statements contained in the police report (citing *Lee Yoke Yam v. Chin Keat Seng*, *Taylor v. Serious Fraud Office*, *Darker v. Chief Constable of the West Midlands Police*, *Dato' Dr Low Tick v. Datuk Chong Tho Chin & Others Appeals* [2017] 8 CLJ 369 and *Mann v. O'Neill* [1997] 191 CLR 204).

[26] The pivotal position that learned counsel for the defendant sought is this. He put forward an argument that republication of the contents of a police report by its maker to the public at large is protected by ancillary privilege, extended from the absolute privilege of the police report. He goes so far as to contend that our decision in *Lee Yoke Yam v. Chin Keat Seng* has settled this issue and therefore does not require any further determination from this court (further citing *Dato' Dr Low Bin Tick v. Datuk Chong Tho Chin & Others Appeals, Kalung Makmur Sdn Bhd v. Lo yen Nyuk* [2018] 1 CLJ 459;

A [2018] 2 MLJ 428, *Tan Sri Dato' Seri Musa Dato' Hj Hassan v. Dato' Seri Anwar Ibrahim* [2010] 8 CLJ 239, *Sharifuddin Mohamed & Anor v. Dato' Annas Khatib Jaafar & Another Appeal* [2016] 3 CLJ 574).

[27] Before turning to the rival contentions of the parties, we should perhaps touch on the three cases mentioned in the question of law posed for our determination.

[28] First, the important case of *Lee Yoke Yam v. Chin Keat Seng*. In this case, the plaintiff filed a suit against the defendant claiming relief for defamation as the content of the report is libellous and injurious to the plaintiff. The plaintiff claimed that the defendant had defamed him by lodging the police report alleging that the plaintiff had misappropriated RM200,000 from a company. Thereafter the defendant filed an application to strike out the plaintiff's action. The High Court found that the defence of absolute privilege for reasons of public policy protected defamatory statements in police reports, thus the plaintiff's claim disclosed no cause of action and is frivolous and vexatious. As such, the High Court allowed the defendant's application and the plaintiff's claim was therefore dismissed. The plaintiff's appeal to the Court of Appeal was also dismissed. The plaintiff then obtained leave to proceed with the appeal to the Federal Court on the following question of law: Whether statements in a police report are protected by the defence of absolute privilege and therefore no party can file a defamation suit against the maker of the police report in the Malaysian context? This court answered the question in the positive. In the context of our present case, the key part of the judgment is as follows:

> [32] ... we agree with the decision of the Court of Appeal in *Abdul Manaf Ahmad* that on public policy consideration, absolute privilege should be extended to a statement contained in a police report lodged under s. 107 of the CPC as in the case of statement made under s. 112 of the CPC. The underlying reason behind this is the overriding public interest that a member of the public should be encouraged to make police report with regard to any crime that comes to his or her notice. Such a report is important to set the criminal investigation in motion. With such report, the alleged crime may be investigated and the perpetrator be brought to justice. It is without doubt that public interest should override the countervailing consideration that this may sometime lead to an abuse by a malicious informant. In any event, if a complainant lodges a false report, he is liable to be prosecuted for making false report under s. 177, s. 182 or s. 203 of the Penal Code. That we believe provides a sufficient safeguard against any person from making a false report.

[29] The following principle of law is now well settled by the decision of this court in *Lee Yoke Yam v. Chin Keat Seng*: On the basis of public policy consideration, absolute privilege is accorded to statements made in a police report irrespective of whether there is element of malice on the part of the complainant. No action for defamation should lie against the maker of a police report; as such public policy considerations override an individual's

interest in protecting his reputation. This position is subsequently fortified by our recent decision in the case of *Dato' Dr Low Bin Tick v. Datuk Chong Tho Chin & Others Appeals* [2017] 8 CLJ 369.

[30] It is very important to point out that the case of *Lee Yoke Yam v. Chin Keat Seng* did not deal, as in our present case, with the subsequent publication of the defamatory statements contained in the police report by its maker to the public at large. In other words, *Lee Yoke Yam v. Chin Keat Seng* was basically a case dealing with the absolute privilege accorded to a police report and the occasion of making the police report to the police by a person, which is a step towards the conduct of criminal proceedings.

[31] It also bears noting that prior to *Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd Kassim* [2009] 2 CLJ 121; [2011] 4 MLJ 346, a defamatory statement made in a police report was only protected by the defence of qualified privilege. In *Abdul Manaf Ahmad v. Mohd Kamil Datuk Haji Mohd Kassim*, the Court of Appeal held that "there is no doubt that defamatory statements in police reports must attract the defence of absolute privilege for reasons of public policy. If actions can be brought against complainants who lodge police reports, then it would discourage the reporting of crimes to the police thereby placing the detection and punishment of crime at serious risk". The Federal Court in *Lee Yoke Yam v. Chin Keat Seng* found that the decision of the Court of Appeal to the effect that the defence of absolute privilege should be extended to statements made in a police report under s. 107 of the Criminal Procedure Code for reasons of public policy was correct.

[32] The second case referred to in the question, is the case of *Taylor v. Serious Fraud Office*. *Taylo*r's case itself was a defamation action in which the defendants were held entitled to absolute privilege. In this case, an investigator employed by the serious fraud office was investigating a conspiracy to defraud. No charges were brought against the plaintiff. In the course of the investigation, the investigator prepared documents that the plaintiff considered them to be defamatory of him. The plaintiff commenced proceedings for libel against the serious fraud office and others. The House of Lords held that absolute immunity from suit which applied to witnesses in respect of statements made in court extended also to out of court statements which could fairly be said to be part of investigating a crime or with a possible view of prosecution. In explaining that absolute privilege is accorded to statements made in a police report, Lord Hoffmann said:

> ... I find it impossible to identify any rational principle which would confine the immunity for out of court statements to persons who are subsequently called as witnesses. The policy of the immunity is to enable people to speak freely without fear of being sued, whether successfully or not. If this object is to be achieved, the person in question must know at the time he speaks whether or not the immunity will attach. If it depends upon the contingencies of whether he will be called as a witness, the value

> of the immunity is destroyed. At the time of the investigation it is often unclear whether any crime has been committed at all. Persons assisting the investigation with their inquiries may not be able to give any admissible evidence; for example, their information may be hearsay, but nonetheless valuable for the purposes of the investigation. But the proper administration of justice requires that such people should have the same inducement to speak freely as those whose information subsequently forms the basis of evidence at a trial.

[33] In the case of *Westcott v. Westcott* [2008] EWCA Civ 818, Ward LJ, in delivering the judgment of the court observed that the House of Lords in *Taylor v. Serious Fraud Office* established the principle that immunity for out of court statements is not confined to persons who are subsequently called as witnesses. The policy being to enable people to speak freely without inhibition and without fear of being sued, the person in question must know at the time he speaks whether or not the immunity will attach. Because society expects that criminal activity will be investigated and, when appropriate, prosecuted, all those who participate in a criminal investigation are entitled to the benefit of absolute privilege in respect of the statements, which they make. That applies whether they are informants, investigators, or prosecutors.

[34] *Taylor v. Serious Fraud Office* is an important authority for the proposition that the subsequent publication or the use of the contents of a police report in judicial or *quasi*-judicial proceedings, (which is not the situation in our present case), is protected by absolute privilege based on public policy consideration.

[35] The next case referred to in the question is *Darker v. Chief Constable of the West Midlands Police*. The first point to note is that this is not a case dealing with a claim for defamation. The claimants in this case brought action against the police for conspiracy to injure and misfeasance in public office. It is also noteworthy that this case is cited by learned counsel for the plaintiff to underline the point that absolute privilege is in principle inconsistent with the rule of law. The protection should not be given any wider meaning than is absolutely necessary in the interests of the administration of justice. Lord Cooke expresses this in the following terms:

> Absolute immunity is in principle inconsistent with the rule of Law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. It is granted grudgingly, the standard formulation of the test for inclusion of a case in any of the categories being McCarthy P's proposition in *Rees v. Sinclair* [1974] I NZLR 180 at 187: The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice ...

[36] It can be seen from the foregoing analysis that if one looks at the matter as a question of principle, a common thread running through the cases is the emphasis on public policy consideration, where the defence of absolute

privilege prevails. Public policy consideration will affect how much weight is given to free speech and the protection of reputation in the judicial balancing process.

[37] We now return to the rival contentions of the parties. In the instant case, there can be no doubt that the contents of the statement in the police report lodged by the defendant in their literal and ordinary meaning were understood to mean, among others, that the plaintiff is a criminal, a thief and is someone who is not honest. If the suit of the plaintiff against the defendant claiming relief for defamation and damages related only to the police report lodged by the defendant against the plaintiff, it is clear that the defamatory statements in the police report is within the protection of the defence of absolute privilege for reason of public policy, thus the plaintiff's claim could not succeed for the reason that it disclosed no cause of action and is frivolous and vexatious. There was no dispute on this. The police report is absolutely privileged and therefore not actionable for the purpose of the law of defamation. The police report lodged by the defendant is the first step in the process of criminal investigation by the police. The police cannot investigate a possible crime without the alleged criminal activity coming to their notice. With such a report, the crime will be investigated and the perpetrator be brought to justice. In our opinion, the grounds of public policy which explain the basis for the absolute privilege rule is to encourage honest and well-meaning persons to assist in the process of investigating a crime with a view to prosecution by relieving the persons who lodged the police report from the fear of being sued for something they say in the reports.

[38] Nonetheless, as we have seen, in the present case, the defendant to whose conduct the claim relates, when approached by the reporters after she had lodged the police report against the plaintiff, repeated what was stated in the report to the reporters at a press conference. That is the crucial difference between the present case and the case of *Lee Yoke Yam v. Chin Keat Seng*. This became an issue and raised an important point of law. The claim for defamation by the plaintiff was based on the subsequent publication of the contents of the police report to the public at large that was later published in Harian Metro.

[39] The issue raised and the arguments by both sides turned upon this fundamental question: whether the defence of absolute privilege should likewise be extended to the subsequent publication of the contents of a police report by its maker to the public at large? Publication means the making known of the defamatory statements, after it has been written, to some person other than the person of whom it is written.

[40] In the main, the Court of Appeal in the present case relied substantially on the judgment of this court in *Lee Yoke Yam v. Chin Keat Seng* to conclude that absolute privilege is accorded to the repetition of the police

report by the defendant to the reporters. The Court of Appeal also relied on *Tan Sri Dato' Seri Musa Hj Hassan v. Dato' Seri Anwar Ibrahim* and *Sharifuddin Mohamed & Anor v. Dato' Anas Khatib Jaafar & Another Appeal*. The material passage of the judgment of the Court of Appeal is as follows:

> [33] In this appeal, the evidence adduced plainly shows that the impugned words in the article were in fact nothing more than a regurgitation of the words in the police report. The police report was republished in the impugned article. We agree with the Defendant that the learned trial judge had erred when she concluded that the defence of absolute privilege is not available to the Defendant. The publication of the alleged defamatory contents of the publication in the Harian Metro attracts the same privilege in an ancillary manner as that attaching to the police report. We are, therefore of the considered view that the publication of the impugned article in Harian Metro would enjoy the protection of absolute privilege in an ancillary manner.

[41] Unfortunately, the Court of Appeal in the present case ignored or overlooked the fact that *Lee Yoke Yam v. Chin Keat Seng* was not a case dealing with the subsequent publication of the contents of a police report by its maker to the public at large. The following point has already been made earlier but deserved to be reiterated: the two cases could not be more different from each other. As we have seen, in *Lee Yoke Yam v. Chin Keat Seng*, the plaintiff's cause of action against the defendant is grounded on defamation whereby the plaintiff contended that the defendant had defamed him by lodging the police report alleging that the plaintiff had admitted misappropriating a sum of RM200,000. In the pleadings, the plaintiff specifically pleaded and provided particulars on the part of the defendant in making the police report. However, in the present case, the critical difference lies in that the plaintiff's cause of action is grounded on the fact that the defendant had repeated in the press conference what was stated in the police report that was subsequently published in Harian Metro. We find that the case of *Lee Yoke Yam v. Chin Keat Seng* is not applicable to the present case.

[42] Similarly the majority of the Court of Appeal in the case of *Kalung Makmur Sdn Bhd v. Lo Yen Nyuk*, that was referred to by learned counsel for the defendant, ignored or overlooked the fact that *Lee Yoke Yam v. Chin Keat Seng* is distinguishable. *Kalung Makmur Sdn Bhd v. Lo Yen Nyuk* is a case in which the respondent lodged a police report alleging that the appellant had lost three cheques, which were handed to the latter by the former. According to the appellant, the words in the police report were understood to mean, *inter alia*, that the appellant was a criminal and an untrustworthy professional entity. The respondent subsequently published the police report by affixing it at the public notice board of the condominium. The subsequent publication of the police report was alleged to have brought the appellant's reputation into disrepute. The appellant commenced an action against the respondent based on the tort of libel. Relying on the case of *Lee Yoke Yam v. Chin Keat Seng*, the majority of the Court of Appeal in *Kalung Makmur Sdn Bhd v.*

Lo Yen Nyuk inaccurately concluded that the publication of the police report by affixing it at the public notice board was protected by absolute privilege and, as such, no cause of action arose from such a report, overlooking or ignoring, with respect, the fact that there is in fact a difference in *Lee Yoke Yam v. Chin Keat Seng*.

[43] This brings us to the High Court case of *Tan Sri Dato' Seri Musa Hj Hassan v. Dato' Seri Anwar Ibrahim* that was relied by the Court of Appeal in the present case. We observe that the High Court in that case referred to *Evan on Defamation* 3rd edn, pp. 142-143 and also the case of *Clarence Wilfred v. Tengku Adnan Tengku Mahmud & Anor* [1983] 1 CLJ 136; [1983] CLJ (Rep) 518 to hold that the subsequent publication of the police report, an absolutely privileged document, would enjoy the same protection of ancillary absolute privilege. This is not a correct proposition of the law. It is altogether unprecedented and there is no authority on which it can be founded to support the proposition. The fundamental difficulty that we have with the decision of *Tan Sri Dato' Seri Musa Hj Hassan v. Dato' Seri Anwar Ibrahim* is that upon closer reading, there is nothing in both the pages of *Evan on Defamation* and the case of *Clarence Wilfred*, which is capable of being read or support the proposition to the effect that a police report being an absolutely privileged document, the subsequent publication of it also enjoys the protection of absolute privilege in an ancillary manner. There seem to be no authority for this proposition. On the contrary, derivatives or ancillary privilege arises where the defendant is acting as the agent of a person who is entitled to rely on the defence of qualified privilege. Thus, where a person who has been publicly defamed replies to the attack publicly, the privilege extends to protect a newspaper, which published the reply of the person defamed (see *Doris Chia's Defamation, Principles and Procedure in Singapore and Malaysia*, 2016 edn at para. 11.43).

[44] In the same way, the Court of Appeal in *Sharifuddin Mohamed & Anor v. Dato' Annas Khatib Jaafar & Another Appeal* [2016] 3 CLJ 574 also fell into serious error when it erroneously relied on *Lee Yoke Yam v. Chin Keat Seng* and *Tan Sri Dato' Seri Musa Hj Hassan v. Dato' Seri Anwar Ibrahim*, to hold that the subsequent publication of the Anti Corruption Agency report, is an absolutely privileged document, which would enjoy the same protection of ancillary absolute privilege.

[45] We agree with the general rule that the extension of absolute privilege must be viewed with the most jealous suspicion and resisted unless its necessity is demonstrated. As stated by Brennan CJ, Dawson J, Toohey J and Gaudron J in their joint judgment in *Mann v. O'Neill* [1997] 191 CLR 204:

> It may be that the various categories of absolute privilege are all properly to be seen as grounded in necessity, and not on broader grounds of public policy. Whether or not that is so, the general rule is that the extension of absolute privilege is "viewed with the most jealous suspicion, and

A resisted, unless its necessity is demonstrated". Certainly, absolute privilege should not be extended to statements which are said to be analogous to statements in judicial proceedings unless there is demonstrated some necessity of the kind that dictates that judicial proceedings are absolutely privileged.

B **[46]** As we have seen, the same point was made by Lord Cooke in *Darker v. Chief Constable of the West Midlands Police*, and we respectfully agree with him, that absolute privilege should not be given any wider meaning than is absolutely necessary in the administration of justice.

[47] In our opinion, there is no valid reason of public policy why the C maker of a police report should be free from accountability by way of defamation action to publish the defamatory words contained in the police report to the world at large. As a matter of public policy, there is no sufficient basis or necessity to expand the ambit of the absolute privilege protection to cover the subsequent publication of the report to the world at large. In that D situation, the right of the maker of the police report to speak and write freely to the public at large cannot override an individual's interest in protecting his reputation. To be more specific, the absolute privilege must at some point give way to protection against reputational damage that it cannot override the individual's right to have access to the courts to seek a remedy for the E defamation on him (see *Doris Chia's Defamation, Principles and Procedure in Singapore and Malaysia*, 2016 edn at para. 9.6 for a useful discussion on the factors which the court may take into account in deciding if a communication would be protected by absolute privilege).

[48] It is in the hands of judges to strike an appropriate balance between F freedom of expression and the protection of reputation. It is necessary here to balance the freedom of expression against the interest of the individual. In our opinion, courts should not extend the ambit of absolute privilege unnecessarily. To hold otherwise would result in persons irresponsibly slandering others with impunity. The laws of libel and slander provide the G primary legal means for defending reputation, and responding to unwarranted and damaging allegations (see *Gately on Libel and Slander*, 12th edn, para. 1.1). For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family; protection of reputation is conducive to the public good (per Lord Nicholls in *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127). Indeed, the freedom H of expression and the responsibilities that come with it is enshrined in art. 10 of the Federal Constitution (see *Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee* [2015] 8 CLJ 477; [2016] 6 AMR 66).

[49] In our opinion, there is no public policy consideration to recognise I that once the police report is absolutely privileged it remains so at whatever occasion it is subsequently published. We agree with the contention of learned counsel for the plaintiff that any public policy and interests of justice do not envisage this. Against such specific contention, we note that learned

counsel for the defendant did not respond or address this point. In our opinion, absolute privilege will not attach to the subsequent publication of the contents of the police report to the public at large save where the contents were made in or in connection with judicial or *quasi*-judicial proceedings. At the same time, we would add that whether the defence of qualified privilege protects it, is a matter which we would leave to a case where the question must necessarily be determined.

[50] Furthermore, it has not been demonstrated in the present case of the necessity for the defendant to publish the contents of the police report to the public at large. In this regard, it bears noting, as found by the learned High Court Judge, that in her testimony in court, the defendant offered no justification or explanation why it was necessary or reasonable for her to repeat the contents of the police report at the press conference beyond saying that she merely answered the questions posed to her by the reporters. In *Farrell v. St John's Publishing Co Ltd* [1986] NJ No. 19, the defendant newspaper published statements referring to a confidential report of the plaintiff deliberately setting fire in an apartment building. The Court of Appeal of Newfoundland held that "no privilege attaches to the unwarranted publication of such report".

[51] It follows therefore that on the question of law posed, we conclude that subsequent publication of a police report by its maker to the public at large is not protected by absolute privilege, save where the contents of the police report were made in or in connection with judicial proceedings. In consequence, our answer to the question is in the negative.

The Additional Point

[52] It is important to note, as we have pointed out earlier, that the defendant also raised the defence of justification in the proceedings in the courts below. It is trite law that the defence of justification is a complete defence to a defamation action (see *Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee*). In the High Court, it was held that the defendant failed to prove the defence of justification, whereas the Court of Appeal had accepted the defence of justification. The Court of Appeal, among others, found that there is cogent or credible evidence of the material fact that she had entrusted the plaintiff with RM200,000 cash on 29 December 2012 to be banked in and that the defendant failed to do so as instructed. In the result, the Court of Appeal held that the impugned statement is substantially true. Hence, the plaintiff's action for defamation cannot succeed. Aggrieved by the decision of the Court of Appeal, the plaintiff filed, as seen earlier, a motion to seek leave to appeal to this court.

[53] It is pertinent to note that on 31 November 2017, the plaintiff's motion for leave to appeal was heard by this court in which two questions were sought to be considered. First, concerning absolute privilege, and

secondly regarding the defence of justification. This court allowed the first question concerning absolute privilege but refused the question pertaining to the defence of justification. It is therefore clear that although we have answered the question pertaining to absolute privilege in favour of the plaintiff, still it will not affect the result of the appeal one way or another.

[54] That, however, is not the end of the matter. At the hearing before us, learned counsel for the plaintiff raised the additional point of the defence of justification. He submitted that the plaintiff is not precluded from raising the issue of the defence of justification in the present appeal because this court has the power and therefore the discretion to permit the plaintiff to argue a ground which falls outside the scope of the question regarding which leave to appeal had been granted in order to avoid a miscarriage of justice (citing *YB Menteri Sumber Manusia v. Association Of Bank Officers, Peninsular Malaysia* [1999] 2 CLJ 471; [1999] 2 MLJ 337 and *Datuk Harris Mohd Salleh v. Datuk Yong Teck Lee & Anor* [2018] 1 CLJ 145; [2017] 6 MLJ 133).

[55] He then submitted that the Court of Appeal had departed from established law and applied the wrong burden of proof to the defence of justification. He brought to our attention the following highlighted passage of the judgment of the Court of Appeal:

> [37] The Defendant had adduced evidence of her source of income and explained in cross examination her source of payment. The person who made the payment to the Defendant was called as witness. DW4 testified in court that he had issued the voucher (Exhibit D2) to the Defendant for the payment of "bayaran ihsan daripada saya atas semua urusan perniagaan". DW4 confirmed in his evidence that he had made the cash payment of RM243,000.00 to the Defendant. The Defendant's father (DW3) gave evidence that he witnessed the Defendant receiving and counting the large sum of money in 28.12.2012. Her Ladyship doubted the veracity of DW4 and DW3's evidence citing various discrepancies in their testimony. **However, her Ladyship has forgotten that the burden is always on the Plaintiff to prove his case**. The Learned Judge should have asked whether it is plausible for a person in the Defendant's position to have cash of RM243,000 on the day in question. During cross-examination, Plaintiff readily admitted that the Defendant definitely had more money than RM243,000.00. *No evidence was adduced by the Plaintiff to prove that the intention of the Defendant filing the police report and making the accusations against him was because he knew of her alleged affair with a Minister.* Her Ladyship also failed to consider the veracity and credibility of the Plaintiff as a witness, especially his conduct after he failed to return to work and his disappearance immediately after the alleged incident.
>
> (emphasis added)

[56] He concluded his submission by saying that the highlighted portions supported his contention that a serious miscarriage of justice had occurred in that the Court of Appeal misdirected itself in requiring the plaintiff to establish the defence of justification. Accordingly, it was argued that the finding of justification ought to be reversed by this court, and that the order of the Court of Appeal should be set aside and the order of the High Court be restored.

[57] In our opinion, this line of argument has no merit. We agree that as a matter of broad general principle, this court is not prevented to add in new questions in order to achieve the ends of justice (see *Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor & Other Applications* [2011] 1 CLJ 51; [2011] 1 MLJ 25).

[58] To this end, we have read the judgment of the Court of Appeal in its entirety and the record of appeal. In our opinion, the complaint of learned counsel for the plaintiff was due to a mistaken reading of the judgment of the Court of Appeal. He misapprehended the terms of the judgment of the Court of Appeal in making the submissions. It is very important to understand the context in which the Court of Appeal made the observations.

[59] On the first highlighted portion, clearly what the Court of Appeal meant is that the plaintiff instituted the defamation action and it is trite law that the plaintiff would bear the burden of proof that the impugned statements were in fact defamatory in nature. It is wrong to suggest that the Court of Appeal required the plaintiff to establish the defence of justification. It is trite that the burden lies on the defendant to establish the defence of justification (see *International Times v. Leong Ho Yuen* [1980] 1 LNS 31; [1980] 2 MLJ 86, *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233; [1988] 2 MLJ 173 and *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 393).

[60] As to the second highlighted portion, it has to be remembered that the defendant lodged a counterclaim against the plaintiff. The relevant portion of the plaintiff's reply and defence to counterclaim is as follows:

> 7. Paragraphs 11, 12, 13, 14 and 15 of the Amended Defence are not admitted and the Plaintiff will rely and adopts the Statement of Claim. The Plaintiff will prove those allegations in Court later during the trial.

[61] It was the plaintiff's case that the defendant maliciously published the impugned defamatory statements. In his witness statement, the plaintiff made allegations towards the defendant involving a Minister. Bearing in mind the allegations advanced by the plaintiff that the impugned defamatory statements was maliciously made by the defendant, the Court of Appeal was

correct in holding that there was no evidence adduced by the plaintiff to prove that the intention of the defendant filing the police report and making the accusation against the plaintiff was because he knew of her alleged affair with a Minister.

[62] In light of the above, it has not been shown that a serious miscarriage of justice had occurred for us to intervene.

Conclusion

[63] In view of the conclusion that we have reached with regard to the question of law and the additional point on the defence of justification, the result is that this appeal fails and must be dismissed.